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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 388

AMALGAMATED ASSOCIATION OF STREET ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, DIVISION 1267, PETITIONER

v.

DADE COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF FLORIDA, AND THE METROPOLITAN DADE COUNTY TRANSIT AUTHORITY, A GOVERNMENTAL ENTITY OF DADE COUNTY, FLORIDA

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT

This memorandum is filed pursuant to the request of the Court for the government's views on the issues raised by the Union's petition for certiorari. The petition seeks review of a judgment of the State courts of Florida declaring that Dade County and its Transit Authority are not permitted, under State law, to recognize and bargain with the Union as the collec-

tive bargaining representative of the Transit Authority's employees, and enjoining the Union from engaging in strike action to compel such recognition or bargaining (Pet. 5–6; Pet. App. A3–A4, A12–A13, A14, A47–A48). The basic question presented is whether Dade County and its Transit Authority in their operation of a transit system in Miami, Florida, are removed from the coverage of the National Labor Relations Act by the governmental exemption in Section 2(2) of the Act. That section provides:

> The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof * * *.

A. THE UNDERLYING FACTS

In the summer of 1960, the Board of County Commissioners for Dade County, Florida, enacted an ordinance creating the Metropolitan Dade County Transit Authority, composed of five members, appointed by the County Commissioners (R. 1389–1390; J.A. 33).[1] The Transit Authority is empowered, under the ordinance, to perform functions with respect to "the acquisition, establishment, financing, operation, maintenance, control and expansion of a mass transit sys-

[1] "R." refers to the portions of the record in the court below filed with the petition. "J.A." refers to the joint appendix to the briefs in *Division 1267* v. *Ordman* (*infra*, p. 11), which is an item listed in the index to the transcript of record. However, since a copy of the joint appendix apparently has not been transmitted, we are filing a copy thereof with this memorandum.

tem * * *, under the direct supervision and control of the Board of County Commissioners" (R. 1390; J.A. 35). Approximately a year after enactment of the ordinance, the County, on the recommendation of the Transit Authority, entered into an agreement for the purchase of four private transit companies from W. D. Pawley (R. 1401, 1405; J.A. 62).

Under the purchase arrangements, Pawley transferred his shares in the companies to the County at an agreed valuation of $7,705,274, minus the liabilities outstanding at the time of closing (R. 1405–1406; J.A. 63). The County did not pledge its faith and credit, or taxing power for payment of this price (J.A. 64, 140). Instead, the County issued Special Revenue Transit bonds in the aggregate principal amount of $9,000,000 (R. 1407; J.A. 64). Out of this total issue, the County paid Pawley the bulk of the purchase price for his transit companies, in bonds of the appropriate principal amount (R. 1406–1407; J.A. 63–64).[2] The balance of the bonds, over and above the purchase price, were sold for cash at face value to customers supplied by Pawley, and the proceeds of these sales were put into the operation of the transit system (R. 1407, 1409; J.A. 64, 65, 74). The bonds pay five percent interest annually and mature serially within the 15 years between 1962 and 1977 (R. 101–102; J.A. 79). Upon specific authorization by County ordinance, however, the bond debt

[2] The only part of the purchase price that Pawley did not receive in bonds was $300,000, which the County paid in cash from the proceeds of the sale of certain transit properties not needed for the County's operations (R. 1426; J.A. 74).

may be refunded up to 40 years (J.A. 88–89). Bond principal and interest payments are to be met exclusively from the revenues of the transit system, which, under the terms of a Trust Agreement (discussed below), are to be held in trust pending the retirement of all bonds (R. 1407, 1564; J.A. 64–65, 74a, 138–139). Although the bonds constitute a first lien on the transit revenues (J.A. 74b, 112–113, 121), they are not to be "construed * * * as conveying or mortgaging the Transit System or any part thereof" (R. 1578; J.A. 140, 64–65). Thus, when Pawley, on February 9, 1962, relinquished full ownership of the transit companies and their assets to the County, he was remitted solely to the rights of a bondholder (R. 1460; J.A. 240–241).

Pawley and the other bondholders have extensive protection for their investment under the Trust Agreement for the transit revenues (R. 1564–1568; J.A. 71–141). The Bankers Trust Company and the Miami Beach First National Bank are named as trustee and co-trustee under this Agreement (R. 1564; J.A. 72). Their function is to act as custodians of the revenues, channeling sums into the various accounting funds,[3] in accordance with the requirements of the Trust Agreement and the current county budget, and paying moneys out of these funds upon requisitions signed by the County Finance Director

[3] These funds include an operating fund, a damage reserve account, a construction fund, an equipment reserve fund, an improvement fund, a special reserve fund, a revenue bond interest and sinking fund, and a renewal and replacement fund (J.A. 83, 105).

and the transit superintendent (R. 1565–1566; J.A. 92, 93–94, 102–103, 104–105, 109, 111, 112).

In addition, the County is obligated by the Trust Agreement to employ a designated "management agency" (National City Management Company) and a designated firm of "consulting engineers" (Coverdale & Colpitts), for the transit operation (J.A. 116–117).[4] The primary function of the management agency is to provide the professional and supervisory personnel who direct "day-to-day" transit operations (R. 1545–1547; J.A. 177–178). It is authorized, for example, to prepare a proposed annual operating budget, subject to review by the Transit Authority and the Board of County Commissioners; to recommend changes in routes, schedules, and fares; to establish equipment maintenance and repair procedures; to assign transit drivers to their runs; to keep attendance schedules; and generally to implement the labor policies established by the County Personnel Department (R. 1437, 1545–1547; J.A. 177–181, 189–191).

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[4] The written approval of the trustee is needed before the County is authorized to employ anyone other than the companies designated, as management agency or consulting engineers (J.A. 116–117). The trustees themselves are removable by a vote of the holders of not less than a majority of the outstanding bonds or for breach of duty, by any court of competent jurisdiction upon the application of the Board of County Commissioners or the holders of not less than five percent of the outstanding bonds (R. 1577–1578; J.A. 132). New trustees may be named by the Board of County Commissioners or by the holders of a majority of the bonds with the latters' choice taking precedence in the event of a disagreement (J.A. 132–134).

The consulting engineers are concerned with the general financial and operational policies of the Transit System (J.A. 95, 96, 97, 114, 117–118, 121–122). For example, the County covenants in the Trust Agreement to begin operations charging the same transit rates that were in effect under private operation, or "such other rates" as are approved by the consulting engineers (R. 1567; J.A. 94–95).[5] Thereafter, the County is obligated not to reduce rates without the consulting engineers' assent (R. 1569–1570; J.A. 96, 97). Although the County may refuse to institute rate increases recommended by the consulting engineers or may institute increases that are not recommended, it is encouraged to follow the recommendations of the consulting engineers by a provision in the Trust Agreement that excuses any default in bond payments provided these recommendations have been followed (R. 1571; J.A. 97–98).

Finally, the Trust Agreement contains certain covenants of sound operation. The County agrees that "all compensation, salaries, fees and wages paid by the Transit Authority * * * will be reasonable, that no more persons will be employed * * * than are necessary for the efficient and economical operation of the Transit System, that it will maintain and operate the Transit System in an efficient and eco-

[5] The approval of the consulting engineers is also needed for any change in the transit routes (J.A. 117), or any alienation of the transit system's assets (J.A. 121–122). Similarly, the Transit Authority must secure the approval of the consulting engineers for a transit system insurance program and for the plans and specifications of a central transit system garage (J.A. 117–118, 114).

nomical manner * * * and that, from the Revenues thereof, it will at all times maintain the same in good repair and in sound operating condition * * *" (J.A. 115–116). If the County defaults in the "due and punctual performance" of any of these covenants, the trustee may, and upon written request of the holders of not less than 20 percent of the outstanding bonds shall, declare the principal on all bonds to be immediately due and payable (J.A. 126). Further, the trustee may, and upon the written request of the holders of not less than 10 percent of the outstanding bonds shall, proceed to protect and enforce the rights of the bondholders by such "suits, actions or special proceedings in equity or at law, either for the specific performance of any covenant or agreement contained * * * [in the Trust Agreement] or in aid or execution of any proper legal or equitable remedy, as the Trustee, being duly advised by counsel, shall deem most effectual to protect and enforce such rights" (J.A. 127).

The County has ultimate control of the Transit System's labor relations. Thus, the County Personnel Department handles all matters connected with the hiring of the transit system's employees, including the taking of job applications, the giving of competitive examinations, and the establishment of hiring standards (R. 1545–1547; J.A. 189–191). The Personnel Department also has authority to fire, promote, and discipline employees (J.A. 178–181, 190–191). In October 1961, the County and the Transit Authority distributed Working Rules and Regulations that were

patterned on the contract terms, including pay scales, previously negotiated between the Union and the private transit companies, prior to the County's take-over of the system (J.A. 177, 188–189, 269–270). These rules provide that the employees of the Transit Authority shall be county employees, generally integrated into the classified civil service; that, as county employees, they may belong to unions that do not assert a right to strike against the County or "to force collective bargaining procedure"; and that the employees, or their representatives, may participate in the public hearings that are to be held prior to periodic revisions of "the rules and regulations relating to the working conditions of employees of the Authority" (J.A. 267–268). The rules further provide that, whenever practical, promotional positions will be filled by competitive examinations under the personnel rules for the classified civil service set out in the Code of Metropolitan Dade County (J.A. 270–271, 266).

B. THE JUDICIAL AND ADMINISTRATIVE PROCEEDINGS

On November 30, 1961, prior to the actual transfer of Pawley's assets and the commencement of operations by the County, the County and the Transit Authority instituted the present suit in the Circuit Court of Dade County (R. 12; J.A. 149, 163). The complaint stated that the Union had demanded that the County and the Transit Authority recognize it as the exclusive bargaining representative of all Transit Authority employees; that they assume the obligations of the

employer under the existing labor agreements between the Union and the private transit companies; and that they enter into negotiations looking toward the execution of a new collective bargaining agreement with the Union (Pet. App. A5; R. 19–20; J.A. 156). The plaintiffs asked the court to enjoin a strike threatened in support of these demands and prayed for a judgment declaring that State law bars Dade County and the Transit Authority from recognizing the Union, or bargaining or entering into an agreement with it, as the collective bargaining representative of the transit employees (Pet. App. A5–A6, A9–A10). The Union moved to dismiss the suit on the ground, *inter alia,* that the rights of the transit employees were protected by the National Labor Relations Act, and that the State court therefore lacked jurisdiction of the subject matter (Pet. App. A7; R. 163; J.A. 28).

The county court rejected the Union's contention. It held that, although the purchase agreement left Pawley with substantial financial or operational control of the transit system, this was not sufficient to divest the County of the governmental immunity provided by Section 2(2) of the National Labor Relations Act. The court further ruled that, under State law, the County and the Transit Authority were not obligated to bargain with the Union on behalf of the transit employees and the Union did not have the right to strike for that purpose. It issued a declaratory judgment to that effect, and an injunction restraining the Union from striking to obtain recognition

or a contract from the County (Pet. App. A19–A53). On November 1, 1963, this decision was affirmed on appeal by the Florida District Court of Appeals (Pet. App. A2–A18).[6]

While the State court proceeding was pending, the Union filed with the Board unfair labor practice charges against W. D. Pawley, Dade County, and the Transit Authority. These charges alleged that the object of the transfer agreement was to enable Pawley to evade the statutory obligation to bargain with the Union and to deprive the employees of their right to strike; that, pursuant to this agreement, the charged parties had refused to bargain with the Union, and had made employment in the transit system conditional on relinquishment of the right to strike; and that the charged parties had thereby violated Sections 8(a) (5), (3) and (1) of the National Labor Relations Act (R. 173–176, 306–307; J.A. 9–18).

On March 2, 1962, the Regional Director of the Board notified all parties by letter that he had decided not to issue a complaint on the Union's charges because "in the present posture of the case the County is the employer of the employees who are or will be engaged in the operation of the transferred transit lines," and the statutory exemption in Section 2(2)

[6] The lower court had held that the transit employees, although County employees, were not eligible under State law to be included in the classified civil service (Pet. App. A20). The appellate court reversed this ruling, remanding the case for a determination of the rights of the employees who accepted employment with the County to classified civil service status and other benefits under State law (Pet. App. A15–A16).

of the Act was therefore applicable. The letter added, however, that the charges would not be dismissed at that time because the outcome of the pending State litigation might "conceivably have an impact" on the issues raised by the charges, and dismissal prior to completion of the State proceeding might therefore prejudice the rights of the charging parties under the limitations period imposed by Section 10(b) (Pet. App. A7–A8; R. 292–293).[7] On June 21, 1962, the General Counsel of the Board affirmed this ruling (J.A. 23–24).

On November 7, 1962, the Union filed suit in the United States District Court for the District of Columbia against the General Counsel, seeking a judgment declaring that the arrangements for purchase of the transit system by Dade County did not remove that system from the coverage of the National Labor Relations Act. The district court dismissed the complaint for want of jurisdiction over the action (Pet. 19). On appeal by the Union, the Court of Appeals for the District of Columbia Circuit affirmed. It held that the complaint failed to state a claim warranting relief because "[t]he General Counsel's decision to defer action on the Union's charge was within [his] * * * jurisdiction [under Section 3(d) of the Act]." *Division 1267* v. *Ordman,* 320 F. 2d 729, 730.

[7] Section 10(b) of the National Labor Relations Act provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board * * *."

DISCUSSION

It is, of course, clear that the provision of the National Labor Relations Act exempting governmental employers from coverage is fully applicable to an enterprise which was once in private hands but has been transferred to public control. Indeed, Congress has only recently recognized that consequence when it enacted the Urban Mass Transportation Act of 1964 78 Stat. 302, providing, *inter alia*, for grants and loans "to assist State and local public bodies and agencies thereof in financing the acquisition * * * of facilities and equipment for use * * * in mass transportation service in urban areas * * *" (Sec. 3(a)). See 109 Cong. Rec. 5672–5674.[8] The only question here is whether there has been a sufficient transfer of the transit systems involved to Dade County so as to make it the employer.

The Board's view is that under settled principles the question should be answered affirmatively.

1. Dade County has made a *bona fide* purchase of the transit lines formerly owned by W. D. Pawley. Although, instead of paying cash, the County issued bonds that are redeemable over a 15-year period out of the revenues of the transit system, the transfer is

[8] In order to cushion this result, the new law provides that it "shall be a condition of any assistance under this Act that fair and equitable arrangements are made, as determined by the Secretary of Labor, to protect the interests of employees affected by such assistance," including "(1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise; (2) the continuation of collective bargaining rights * * *" (Sec. 10(c)).

complete. There is no evidence that the transaction was arranged to evade the requirements of the National Labor Relations Act in an invidious sense. The record indicates only that the parties were aware of the exemption provided governmental employers under Section 2(2) of the Act and regarded the resulting freedom from strikes and collective bargaining as among the advantages of State ownership and operation of the transit system (J.A. 55–57). In short, we are not confronted with the question of the effect of a sham transaction in pursuance of a collusive plot to defeat National Labor Relations Act coverage.

2. Nor is this a case where government has shared employer controls with a private party. In the Board's judgment, the controls reserved by Pawley, though substantial, do not have a sufficiently direct bearing on employment conditions to make Pawley a co-employer of the transit employees.* There is no evidence that Pawley can directly countermand the labor policy fixed by the County Personnel Department, or otherwise directly regulate the working conditions of the transit employees, who are paid by the County. If Pawley believes that the County is paying too much of the transit revenues out in wages, he could, through his control over the trustees, presumably induce them to bring a suit against the County for breach of the trust covenants; but, in order to succeed, he would have to satisfy the court that the

* Whether one is an employer of particular employees for purposes of the Act is ordinarily determined by whether he has power directly to control their employment conditions. See *infra*, pp. 15–17.

wages were not "reasonable" (J.A. 115). Moreover, it does not appear that Pawley has any control of the employment relation through the management agency or the consulting engineers. First, these firms are not themselves vested with employer controls under the Trust Agreement.[10] Second, although Pawley approved the firms selected for these positions, they are independent companies which have other clients. There is no reason to believe that they would be subservient to Pawley's wishes. And, if the County is satisfied with their services, no provision is made in the Trust Agreement for their displacement by the bondholders; the trustee's power to approve other firms to be employed as management agency or consulting engineers comes into play only if the County desires to make a change.

3. The Union does not seriously contend that the County or the Transit Authority shares the employer controls with Pawley or any private entity. Rather, the Union's basic position is that the governmental immunity conferred by Section 2(2) of the Act is lost whenever a State agency enters into a joint venture with private interests, and that the County has done so here by vesting private parties with sub-

[10] Of the private interests involved, the management agency has the closest contact with the transit employees. It sets bus routes, assigns drivers, keeps attendance records, and establishes procedures for the regular maintenance and repair of the equipment. But, so far as labor relations are concerned, the management company's employees simply implement policies established by the County and the Transit Authority in much the same way that any supervisory employee carries out the policies of his employer.

stantial powers (albeit not power over employment conditions and labor relations) in respect to the operation of the transit system. Accordingly, the issue comes down to whether a governmental agency loses the immunity conferred by Section 2(2) of the Act whenever it shares control with private interests, or only when it gives up control over employment conditions and labor relations to a private party. The Board is of the view that Section 2(2) immunity is lost only in the latter case, and that, since there was no sharing of employer controls with private interests here, the State courts correctly concluded that the County-operated transit system was removed from the coverage of the National Labor Relations Act.

Section 2(2) provides that the term employer shall not include "the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof." This exemption appeared in the original Wagner Act, except for the phrase "or any wholly owned Government corporation, or any Federal Reserve Bank," which was added in 1947. The legislative history of the provision is sparse, but it indicates that Congress' purpose was to avoid intrusion upon relations between the federal, State and municipal governments and their employees, who traditionally were denied the right to strike against the government.[11] Con-

[11] See Leg. Hist. of the National Labor Relations Act, 1935 (G.P.O., 1949) 1117, 2653; Leg. Hist. of the Labor Management Relations Act, 1947 (G.P.O., 1948) 1535.

The addition in 1947 was designed to make clear that the exemption extended to such governmental entities as TVA or

sistent with this objective, the immunity should apply only where the government can directly control the employment conditions of the employees involved; *i.e.*, where the government, under the tests for determining employer status under the Act,[12] would be regarded as the employer or a co-employer of the employees. For only where the government was able to exercise such control over employment conditions would the Act's requirements be likely to impinge on contrary governmental policies respecting collective bargaining and strike activity by employees.

The Board has applied the governmental exemption in Section 2(2) in accordance with this view. Its precedents in this area may be divided into two categories. In the first category are cases involving agreements by government with private independent contractors for the performance of services or the supplying of goods. There, the Board has inquired who has the relevant employer controls. If government alone possesses them, the Board has held that the statutory exemption at-

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RFC, but did not include an essentially private corporation merely because the United States happened to own some stock therein. See Leg. Hist. of the Labor Management Relations Act, 1947 (G.P.O., 1948) 303, 536, 1605–1606; and *National Labor Relations Board* v. *Bank of America, etc.*, 130 F. 2d 624, 627, n. 4 (C.A. 9), certiorari denied, 318 U.S. 791, decided prior to enactment of the amendment.

[12] See *National Labor Relations Board* v. *Lund*, 103 F. 2d 815, 819 (C.A. 8); *National Labor Relations Board* v. *Condensor Corp.*, 128 F. 2d 67, 71–72 (C.A. 3); *National Labor Relations Board* v. *Concrete Haulers, Inc.*, 212 F. 2d 477, 479 (C.A. 5); *Public Service Corporation of New Jersey*, 72 NLRB 224, 225–226.

taches to deprive it of jurisdiction.[13] If the independent contractor has the employer controls, the Board has ruled that he comes within the coverage of the Act, even though government holds title to all property, the contract is on a cost-plus-fixed fee basis, and cost items (including wages) are subject to governmental review and approval.[14] And, where the employer controls are shared by government and a private entity, the Board has concluded that the Act's coverage is limited "to those aspects of the labor relations" within the control of the private entity. *Tampa Shipbuilding Co., Inc.*, 62 NLRB 954, 961.[15]

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[13] *Roane-Anderson Co.*, 95 NLRB 1501, 1503. See, also *Fruco Construction Co.* v. *McClelland*, 192 F. 2d 241, 244–245 (C.A. 8); *Patton* v. *Roane-Anderson Co.*, 192 F. 2d 965, 967–968 (C.A. 6).

[14] *Thiokol Chemical Corp.*, 113 NLRB 547, 548; *Carbide and Carbon Chemical Corp.*, 73 NLRB 134, 135–136; *Garner Aviation Service Corp.*, 101 NLRB 517, 518; *American Smelting and Refining Co.*, 92 NLRB 1451, 1452; *Cosmopolitan Shipping Co.*, 2 NLRB 759, 761–762. See, also, *National Labor Relations Board* v. *Carroll*, 120 F. 2d 457 (C.A. 1); *Geronimo Service Co.*, 129 NLRB 366, 368; *War Hemp Industries, Inc.*, 57 NLRB 1709, 1710, n. 3; *Brown Shipbuilding Co.*, 57 NLRB 326, 328; *Copolymer Corp.*, 52 NLRB 578, 579.

[15] See *National Labor Relations Board* v. *Atkins & Co.*, 331 U.S. 398, 412–413, 414–415: "We cannot say that the Board was without warrant in law or in fact in concluding that respondent retained 'a sufficient residual measure of control over the terms and conditions of employment of the guards' so that they might fairly be described as employees of respondent. The most important incidents of the employer-employees relationship * * * remained matters to be determined by respondent rather than by the Army. * * *

"Here we have the Board's considered * * * judgment that militarized plant guards may safely be permitted to join unions and bargain collectively and that their military duties

In the second category of cases, someone who controls the employment relationship contends that it is an arm or instrumentality of government and, as such, is entitled to the exemption. The Board has sustained this contention where the entity claiming the statutory exemption has been created directly by the State, or is administered by State appointed or publicly elected individuals.[16] On the other hand, where the State has merely lent a label to the entity or has

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and obligations do not suffer thereby * * *. [Consistent with this judgment, the] regulations and directives [of the War Department] have clearly acknowledged the feasibility of recognizing collective bargaining rights of these guards during wartime, provided only that no encroachment is made upon military necessities." See, also, *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 331 U.S. 416, 425–426; *Montgomery Steel Products Corp.*, 94 NLRB 225, 226, n. 2.

[16] *Mobile Steamship Association*, 8 NLRB 1297, 1305, 1308 (State Docks Commission held division of the State of Alabama); *Oxnard Harbor District*, 34 NLRB 1285, 1290 (Harbor District held political subdivision of the State of California); *New Jersey Turnpike Authority*, 33 LRRM 1528, April 16, 1954, Administrative Decision, not officially reported (Turnpike Authority entitled to employer exemption under Sec. 2 (2)); *Int'l Brotherhood of Electrical Workers, Al J. Schneider Co.*, 87 NLRB 99, 100 (Board of Education held political subdivision of the Commonwealth of Kentucky); *New Bedford, Wood's Hole, Martha's Vineyard, etc.*, 127 NLRB 1322, 1324 (Advisory Opinion, Steamship Authority held political subdivision or instrumentality of the Commonwealth of Massachusetts); *Civilian Cafeteria Board*, 106 NLRB 208 (Cafeteria Board held agency of the United States). Cf. *National Food Corp.*, 88 NLRB 1500, 1501 (Pentagon Post Restaurant held government agent, but management services performed by National Food Corporation found to entail employer controls bringing corporation itself within coverage of the Act). See, also, *Creekmore* v. *Public Belt R.R. Comm'n of*

simply exercised certain regulatory controls over an essentially private operation, the claim of immunity has been denied. *Randolph Electric Membership Corp.*, 145 NLRB No. 79, pending on petition for enforcement with a companion case, *Tri-County Electric Membership Corp.*, 145 NLRB No. 10, (C.A. 4), Nos. 9437, 9438; *Middle Dept. Assoc. of Fire Underwriters*, 122 NLRB 1115; *Toledo Board of Trade*, 117 NLRB 1504, 1506–1507.

Under these precedents, the County, in its operation of the transit system, is entitled to the immunity conferred by Section 2(2). It possesses the relevant controls over employment conditions and labor relations, and does not share them with Pawley (see *supra*, pp. 7–8). Moreover, the County is a political subdivision of the State and operates through publicly elected officials, and the Transit Authority was directly created by the County.

There is no merit to the Union's argument (Pet. 25–26) that the specific exclusion for "any wholly owned Government corporation" indicates that immunity is not afforded where government shares "ownership controls" with private persons, as here. As noted (n. 11, p. 15, *supra*), that provision,[17] which was added in 1947, was designed to make clear that the exemption in Section 2(2) extended to such gov-

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New Orleans, 134 F. 2d 576, 577–578 (C.A. 5), certiorari denied, 320 U.S. 742.

[17] The provision appears to reflect the rule of such early decisions as *Bank of the United States* v. *Planters' Bank of Georgia*, 9 Wheat. 398, 399, that a private corporation does not acquire governmental status just because the government grants it a charter or owns some of its stock, *infra*, p. 23.

ernmental entities as TVA or RFC, but did not include an essentially private corporation merely because the United States happened to own some stock therein. The present situation is not analogous to that in which the government merely holds stock in a private corporation. Here, the government ownership is total rather than partial. The County holds title to all transit system assets, and, although Pawley and the other bondholders have power to mature the bonds should the County default or breach the covenants of the Trust Agreement, they have no ownership interest in the Transit System assets; rather, the interest of the bondholders, including Pawley, is essentially merely that of a preferred creditor.[18] Cf. *Reconstruction Finance Corporation* v. *Merryfield,* 134 F. 2d 998, 991–992 (C.A. 1), where the financial in-

[18] Contrary to the Union (Pet. 8–9), the power of the bondholders to call up all the bonds in the event of a default and to institute, through the trustee, suits for specific performance of the covenants of the Trust Agreement does not give Pawley a right of reversion in the Transit System upon default in the bond payments or breach of the covenants of sound operation. Under the Agreement for Delivery of Possession, Pawley is deemed to have relinquished full ownership of the Transit System and its assets to the County and is remitted solely to the rights of a bondholder. Although the bonds issued entitled Pawley and the other bondholders to a first lien on the transit revenues for payment of the bond principal plus interest, they specifically recite that they are not to be "construed * * * as conveying or mortgaging the Transit System or any part thereof." See p. 4, *supra*, and the discussion of such provisions in Fordham, *Revenue Bond Sanctions,* 42 Col. L. Rev. 395, 431, 433, and Nehemkis, *The Public Authority: Some Legal and Practical Aspects*, 47 Yale L. J. 14, 23–24. See, also, *State* v. *Dade County*, 142 So. 2d 79, 88 (S.Ct. Fla.) validating the Transit Revenue Bonds.

terest and control of the RFC in the affairs of a shoe corporation was held not to create an employer-employee relationship within the coverage of the Fair Labor Standards Act.[19]

The cases relied on by the Union do not require a contrary conclusion. In *Bus Employees* v. *Missouri*, 374 U.S. 74, the Court held that the State could not, through its strike seizure procedure, defeat the Section 7 right of public utility employees to strike. However, the Court emphasized that (374 U.S. at 81):

> * * * the State's involvement fell far short of creating a state-owned and operated utility whose labor relations are by definition excluded from the coverage of the National Labor Relations Act. The employees of the company did not become employees of Missouri. Missouri did not pay their wages, and did not direct or supervise their duties. No property of the company was actually conveyed, transferred, or otherwise turned over to the State. Missouri did not participate in any way in the actual management of the company, and there was no change of any kind in the conduct of the company's business. * * *

Here, on the other hand, the employees of the transit system became County employees, the County paid

[19] In any event, even if the trust for the bondholders could be analogized to a corporation in which the bondholders participate as shareholders with the County, by virtue of their right to receive interest and to enforce the covenants protecting the security of their investment, any waiver of the County's immunity which could be inferable from its joint participation therein (cf. *Planters' Bank*, pp. 23–24, *infra*) would appear to be applicable only to proceedings against the trust itself, which is certainly not an employer under the Act.

their wages and supervised their duties, and the property was actually conveyed, transferred, and otherwise turned over to the County.

In *United States* v. *United Mine Workers,* 330 U.S. 258, the government seized the coal mines under an arrangement whereby it "substituted itself for the private employer in dealing with those matters which formerly were the subject of collective bargaining between the union and the operators," negotiating a new collective agreement with the union. In these circumstances, the Court held that the government became the employer of the employees, with the result that a strike could be enjoined wihout regard to the Norris-LaGuardia Act, notwithstanding that the government retained the private managers of the mines with substantially the same functions and authority as before;[20] that "none of the earnings or liabilities resulting from the operation of the mines, while under seizure, are for the account or at the risk or expense of the Government; that the companies continue to be liable for all Federal, State, and local taxes; and that the mining companies remain subject to suit" (330 U.S. at 287, 288). The governmental involvement here is far greater and has none of the temporary features present in *Mine Workers.*[21] Moreover,

[20] The Court noted that the government retained ultimate control, since its regulations provided for removal of the managers at the discretion of the Coal Mines Administrator.

[21] Cf. *Hoosier Veneer Co.*, 21 NLRB 907, 935–937, modified and enforced *sub nom. National Labor Relations Board* v. *Bachelder*, 120 F. 2d 574 (C.A. 7), certiorari denied, 314 U.S. 647, also cited by petitioner (Pet. 23–24), where a court-appointed receiver was found to be a "person acting in the interest of an employer," under Section 2(2) of the Wagner Act.

Mine Workers shows, contrary to the Union's contention, that governmental immunity is not automatically lost where the government shares some of the incidents of ownership and control with private interests.

Petitioner also relies on cases in which coverage of the States and their subdivisions is implied in the absence of any statutory exemption for such governmental entities (Pet. 21, 22, 23, 24, 27). *Parden* v. *Terminal Railway of the Alabama State Docks Department,* 377 U.S. 184, 188–189 (Federal Employers' Liability Act); *California* v. *Taylor,* 353 U.S. 553, 564–565 (Railway Labor Act). These decisions have little bearing on the issue of coverage under the National Labor Relations Act which expressly excludes from the definition of employer in Section 2(2) "any State or political subdivision thereof."[22] Similarly the language in *Bank of United States* v. *Planters' Bank of Georgia,* 9 Wheat. 398, 399, that "when a government becomes a partner in any trading company, it divests itself, so far as concerns the trans-

[22] Cf. *Plumbers' Union* v. *Door County,* 359 U.S. at 354, 358–359, and *Al J. Schneider Co.,* 87 NLRB 99, 100–101, cited by petitioner (Pet. 21–22). These cases involve the definition of "person" under Section 2(1) of the Act which does not exclude governmental entities. Thus, the question there presented was the right of political subdivisions to the protection against secondary pressure afforded "person[s]" under Section 8(b)(4). As the Board stated, in a case involving the exemption of governmental employers in Section 2(2), such holdings "are inapposite as they involve action directed against, rather than jurisdiction over, governmental agencies." *New Bedford, Wood's Hole, Martha's Vineyard, etc.,* 127 NLRB 1322, 1323–1324. See, also, *Peter D. Furness,* 117 NLRB 437, 439–441, enforced, *sub nom. National Labor Relations Board* v. *Local Union No. 313, etc.,* 254 F. 2d 221 (C.A. 3), overruling *Al J. Schneider, Co., supra.*

actions of that company, of its sovereign character, and takes that of a private citizen," is addressed to a totally different problem. As indicated, *supra*, n. 17, p. 19, the question there was simply whether a suit against a bank was a suit against the State, and thus barred under the Eleventh Amendment to the Constitution, because the State had issued incorporation papers to the bank and owned some of its stock. The Court held that those circumstances were insufficient to cloak the corporation with the sovereignty and immunities of the State. Here, on the other hand, the question is not whether a private corporation acquires governmental immunity because the government is a participant,[25] but, rather, whether the government itself loses its immunity with respect to an enterprise which it wholly owns, and exercises employer control over, merely because, instead of paying cash for the assets, it buys on the installment plan and accords the bondholders certain financial controls as security for the debt owed them.

4. The decisions requiring State courts to stay their hand in matters "arguably" within the jurisdiction of the Board are inapposite here. The underlying facts are not disputed and the issue is the scope of the statutory exemption for governmental employers. The

[25] Cf. also the cases cited at p. 24, n. 10 of the petition. Compare *Emergency Fleet Corp., United States Shipping Board* v. *Western Union Tel. Co.*, 275 U.S. 415, 422–423, 425–426 (Pet. 24) with *Sloan Shipyards* v. *United States Shipping Board Emergency Fleet Corp.*, 258 U.S. 549, 567–568 (Pet. 22) for the differing treatment that a claim of sovereign privilege by a wholly owned government corporation may receive in different contexts. See the express exemption accorded "wholly owned Government corporation[s]" in Section 2(2) of the Act.

General Counsel—whose decision bars the Board from taking jurisdiction—has declined to act on the express ground that the employer in suit is outside the scope of the Act. And, with the benefit of the fully developed record here, the Board itself has now expressed its view to the same effect. Whatever the "arguability" of the question when the Florida courts first asserted jurisdiction, it is now the Board's considered submission that they did not invade a pre-empted area. Cf. *Retail Clerks* v. *Schermerhorn*, 373 U.S. 746, 755–756.

In closing, we note that the Board is not aware of any similar case in which the present question is presented.

CONCLUSION

For the foregoing reasons, the Board believes that the Florida courts correctly concluded that the transit system operated by Dade County was removed from the National Labor Relations Act by the governmental exemption in Section 2(2).

Respectfully submitted.

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